CORRECTED BRIEF
No. 89-1083

IN THE

Supreme Court of the United States

October Term, 1989

J.I. HASS CO., INC.,

Petitioner,

against

GILBANE BUILDING COMPANY,

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY

Reply Brief to Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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Preliminary Statement.

The purpose of this reply to Respondent's Brief in opposition to Petition, is to counteract or contradict some salient assertions that may be misleading to the Court in its consideration of the special and important reasons for granting the Writ of Certiorari. We will, of course, rely upon our Petition filed in this matter as the prime basis for our Petition.

POINT I.

Special and important reasons have been established for granting of Petition for Writ of Certiorari.

The prime issues serving as the reasons for granting the Writ, as stated in the Petition, pertains to the power or right of the Court of Appeals to make a *de novo* review as to the factual issues resolved and determined by the jury, after proper charges by the trial Court. It is apparent that Courts of Appeal should not take upon itself to make new decisions as to the facts and law, without having defined any clear erroneous error of law, and in conflict with the general enunciations of the principles of law, both Federal and New Jersey, which is a clear denial to the successful party of its Constitutional right to trial by jury under the Seventh Amendment.

It is respectfully submitted that the very tenor of the Brief of the Respondent in opposition to the Petition, as demonstrated by the statements and legal positions contained in the Brief of Respondent in opposition to the Petition for a Writ of Certiorari gives the reason for granting the Petition.

We have separated the Reply into two sections—one where we respond to many of the basic arguments of the Respondent, and the other as to specific references to testimony and exhibits by Respondent, which are not supported by a reading of the record of the trial of the case.

1. Response to Arguments of Respondent.

The recitation of the assertions of the Respondent, which are repeated in many sections of its Brief in opposition are frequently and materially mis-stated or stated to give a portion of the testimony and ignoring in some cases the redirect testimony, to present a distorted picture, which they hope will be believable, if repeated more than twice, all of which very sufficiently demonstrates that we were

dealing with factual differences and disputes and not legal issues. These very arguments were stated to the jury for days of summation and not found by the jury to be the credible proof by a preponderance of evidence.

The Respondent who infers, at the bottom of page 8 that Petitioner was improperly dealing with matters and circumstances surrounding the intended Contract, in accordance with *Atlantic Northern Airlines, Inc. v. Schwimmer,* 12 N.J. 273, 301 (1981) and *Barco Urban Development Corp. v. Housing Authority of Atlantic City,* 674 F.2d 110 (3rd Cir. 1982), spends most of its factual assertions to support its position in the testimony as to events surrounding the purported contract to justify its argument.

It is truly regrettable that Respondent, in its counter-statement of the case, ignores the very essential facts—first that the purported originally designed contract and Charge Order No. 1 were both signed and executed at the same time and place, which was an essential basis on which Judge John W. Bissell founded his response to the jury's inquiry during their deliberations and to which Respondent agreed that they both had to be considered together and, secondly, that they fail to acknowledge the mis-statement of the Court of Appeals that the work for the separate buildings was not generated by the change order provisions of the purported contract under Paragraph 7b, but put out on an invitation to bid to several painting subcontractors and Petitioner was the successful bidder. It was not made pursuant to the provision as to change order of the proposed Subcontract, referred to as Base. The statement on page 3 of Respondent's Brief that Change Order No. 1 was issued under the provision for performance of extra work as "Base Subcontract" belies the true facts of the case—which cannot be disputed.

Again, on page 2 of Respondent's Brief, it states Room Finish Schedules were provided for each building. It says that the original building provided for architectural and structural painting. Nowhere does Respondent refer to the drawing referenced in the original proposed agreement to all the plumbing, HVAC, fire protection, electrical, etc.—mechanical systems.

Nowhere does Respondent mention that the bid for the Packaging and Warehouse building was some 65% to 70% of the total work nor does it deny, because the testimony and proof was clearly to the contrary, that the Room Finish Schedule for the other buildings included work which was intended to include the Process Piping and Equipment Package mechanical work to be let out directly by Miller nor that there was tunnel work stated in Room Finish Schedule which was not included in Hass' contract, or that there were three to four other painters doing painting, as well as painters doing work for the mechanical subcontractors, all of whom used the same Room Finish Schedules.

On pages 4 and 5 of our Petition for Writ of Certiorari, we state the fact, above related, that under date of March 31, 1981, the work for the additional buildings was let out by a formal invitation to bid and not as a Request for Change Order, pursuant to the original intended "subcontract", to various painting subcontractors and the proposal of Hass, which was required and, in fact, submitted by 4:10 P.M. on April 15, 1981. The bid was based upon the drawings as to Packaging and Warehouse building (which constituted 65% to 70% of the combined Contracts) that were available to Hass prior to April 15, 1981, which did not include mechanical work.

Respondent argues on pages 22 and 23 of its Brief that even if Hass did not receive the updated Room Finish Schedule for the Package and Warehouse building that it did have them when a Request for Change Order was

issued. When we read the Appendix references cited, we find that the reference is the request for GC1E. Its argument is a complete fallacy. Respondent fails to say such request had an issue date of April 27, 1981 and it did not say that at A3449, there is (1) a notation that this RCQ was for the amount of $8,950.00 for extras, a small fraction of the claimed mechanical work, (2) that it covered the extra of "Exterior Precast Concrete Panels"; that (3) the drawing list on A3442 is incomplete with notations that demonstrate our argument of the non-existence or incomplete status of listed drawings; and that (4) the references to the specific building "Packaging and Warehouse" in A3447 refer only to Architectural and Structural drawings and, (5) most importantly, omitted by Respondent is that the items which dealt with Process Piping and Equipment Package and mechanical, which Petitioner testified to and established, was for future bidding by Miller and/or Gilbane, was not received, according to all testimony (and as contained by Gilbane's stamp) until on or after April 30, 1981. These are contradicted and uncontradictable facts which the Court of Appeals did not recognize in its usurping of the jury's deliberative process, and which the Respondent continues to put forth. The testimony, as stated by Petitioner, is that these additional drawings and a considerable portion of revised drawings were not received by Petitioner until after August 17 or 18, 1981.

Respondent on page 8 says that Petitioner has taken facts out of context and, in many cases, Hass alleges facts that are not even supported by the record. Not only has Respondent not listed one such failure so that it can be refuted but for Respondent to state that Change Order No. 1 was issued pursuant to Section 7b in the purported Subcontract, for additional compensation for extra work is an impropriety since a reading of the language of Section 7b will show its inapplicability. The recitation of all the facts including that of William Kearny for Gilbane and Nagin Patel and Louis Fulco for Hass, that they visited the project

site on April 7, 1981, as did other building subcontractors for all trades including painters, for purposes of obtaining information as to bidding for the separate buildings, as to the discussion that the understanding with Alan Bernstein, the purchasing agent for Gilbane, which was not disputed, established that the bid would be only for architectural and structural work. (A 306, A 307, A 34, A 1194, A 1559, Transcript p. 856-859.) (A 1230-A 1232.) Since Hass was the successful bidder, Gilbane, who prepared all the documents which failed to have express language that it included the "mechanical work", for its convenience, it was set out as a change order.

Respondent says on page 13 that Petitioner does not even challenge the statements of governing law by the Court of Appeals. This is pure nonsense. The Petitioner brings into focus the legal issue of the power of the Court of Appeals to retry issues of fact *de novo* or substitute its judgment with respect to such issues for that of the trier of the facts. *Lame v. United States Department of Justice,* 767 F.2d 66, 69 (3rd Cir. 1985) and other cases cited, raises the question whether it can be stated that because trial court denied the motion for a new trial, or to set aside on a N.O.V. motion and then say that it is a legal issue and destroy the process of the right to trial by jury. Can it blithely ignore the cases of *Atlantic Northern Airlines, Inc. v. Schwimmer, supra,* and other cases; can it cite the case of *Merchants Indemnity Corp. v. Eggleston,* 37 N.J. 114 (1962) and says it applies to the factual situation of this case, when it is directly opposite.

That case, incidentally, is not a case of election of remedies, as was and is urged by Respondent, page 22, but one of waiver of estoppel where there was no reservation of rights and an affirmance. The only use of word "election" is not as to choice of remedies but only that carrier elected to affirm the contract, later alleged to be the subject of fraud.

Can they truly say there was an affirmance when all the facts are that on December 15, 1982 Hass said it had concluded all its work and refused to do the many hundreds of thousands of dollars of work that Gilbane said they were required to do as to mechanical work. Contrary to the implication on page 21, the only work, excepting therefrom protest items, Hass did and, as known to Gilbane, was architectural and structural work, and it may well be said with more conviction, that Gilbane affirmed a contract for architectural and structural work by not rescinding or terminating a contract where Hass did not and refused to do any other mechanical work. There is testimony that Gilbane gave notice of an intention to terminate if they did not do the work—but they did not and thus Gilbane, in fact, affirmed Hass' position of no requirement.

Did the Court have the right to ignore that on the work done by Hass, under protest for $144,682.00, it was also protested by Gilbane's project manager, David A. Ricke, was not with its scope of work and that they would seek compensation. No attempt is made to answer or reconcile this.

The very strong proof of the direction of the argument of Respondent that the Court of Appeals was dealing with factual questions appears an page 23 where Respondent uses some nice phrase instead of common sense, to refer to "Hass preponsity for confusing rationalization is typified by its reference to trial (Exhibit 76) as to two charts prepared by Gilbane". It is an admission that these charts are devastating to Respondent's rationalization of approach at the trial stage of saying that the originally intended contract did not include mechanical items and the so-called Change Order No. 1 did. All this notwithstanding, Respondent still says that Hass did the work on the Brewhouse, a mechanical item, without direction of Gilbane, without a right of payment, even though it was not in the "Base Contract" which it says could not require anything but architectural and structural painting.

These two charts by the proof accepted by the Court in its admission of the exhibit and the acceptance by the jury, came about in the discovery process from the files of Gilbane and its corporative references of the one chart to the other, left no doubt that these were the products of Gilbane. In no event did Gilbane ever attempt to explain how they otherwise got into their files. What they purport to show is very clear and why the Respondent doth protest so much about its having been used.

In the entire involvement of the Respondent, is an attempt to avoid the very salient facts that the Room Finish Schedule is not an end to all the issues of scope of work.

2. Specific References by Respondent which are Contrary to Record.

a) On page 4, not 2, says "Hass concedes that it painted these ducts [in the Brewhouse building of "Base Contract] on its own and not pursuant to any request of Gilbane". It refers to Appendix A 2111.23 and A 2111.34. A reading of this transcript will show not only was this the testimony of Augustus (Gus) Quarantello, who was a worker in the field not a representative of Hass, but a reading of the transcript will show there is only a reference as to whether he "did not do the work under protest" but did not concede they did it on their own, or that there was a request by Gilbane to any one else, or that it was not protested by the representatives of Hass. The great fallacy of Gillbane's trial tactics is, if it was so clear that such mechanical work as painting ducts in the Brewhouse was not part of Hass' scope, and here it was painted and not paid for by Gilbane, destroys the position of the clear difference of so-called "Base Contract" and Change Order No. 1. Not referred to, of course, is the testimony of Louis Fulco (A 963), who was the project manager representing Hass, says "it painted 'ducts in the Brewhouse' under protest".

b) At the bottom of page 9 and top of page 10 of Respondent's Brief, it speaks of Hass, conceded knowledge that Change Order No. 1 included painting of the building mechanical system before entering into the Change Order. To say that this is a fact and not referred to by Hass' statement of the case, is most absurd. The whole case of plaintiff is replete with Hass' contention that it was not included and so recognized by Hass' representative's discussion with Alan Bernstein, purchasing agent of Gilane, and the fact that concurrently with that time, RCQ 115G was issued for mechanical work in a "Change Order Number 1" building—(cold service area) and many other sections, as on pages 14, 15, 16, 17 and 18 of the Petition and as well as page 23. The reference to the Appendix on page A961 does not nor does A962 say anything about knowledge and A963 a question to Mr. Fulco as to whether before C.O. signed, if became aware of expanded scope of painting, the answer is "not at all". As to the ducts in Brewhouse, Fulco replied it was done "under protest". Completely omitted from Respondent's Brief is the redirect testimony of Fulco. He testified by way of explanation of the "yes or no" cross-examination, is that they expected to do this mechanical work by future Request for Change Quotations—A998. He also testified work was protested before it was done—A996. This further demonstrates that we were dealing with factual interpretations and not legal issues.

c) On page 22, Respondent states that Hass "omits to disclose that all other Change Order No. 1, Room Finishing Schedules, with mechanical work, were issued prior to estimating Change Order No. 1". Petitioner has dealt with this throughout its Petition and entire trial of the case by showing the incompleteness of drawings, non-existence of drawings and its use for future contracts.

d) On page 23 it states so outrageously inaccurate that a Change Quotation issued before Change Order No. 1 was

entered into, which refers to RCQ GC1E, dated April 27, 1981 in the appendix references, is considered above on pages 4 and 5.

e) On the bottom of page 26, references are made to A838-839, A850 and A859 as proving the scope of work, described by Hass' Project Executive. The question is whether they "looked at" Room Finish Schedule and "relied upon it" and on "Section 9F of specification"—isn't it true". The answer was, "Yes, that is true". It does not elicit, as does the whole of the testimony, how much more there was to the considerations and reliances such as necessity of drawings. A850 does not establish anything and A859 does not bear any testimony to support the vague charges of Respondent.

CONCLUSION.

The Respondent's Brief gives the most substantial reasons to the manifest injustice that would be suffered by Petitioner if the denial of Petitioner's right to trial by jury, should be taken from the Petitioner.

Dated: Roseland, New Jersey
February 5, 1990.

Respectfully submitted,

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